

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KIM DALE)	
Claimant)	
VS.)	
)	Docket Nos. 1,060,057
HAWKER BEECHCRAFT ACQUISITION CO., LLC)	1,051,048
Respondent)	
AND)	
)	
HAWKER BEECHCRAFT CORP.)	
Insurance Carrier)	

ORDER

Claimant requests review of the May 30, 2012 preliminary hearing Order entered by Administrative Law Judge Thomas Klein. The Administrative Law Judge (ALJ) denied claimant's request for benefits pending further hearing as "claimant has failed to prove her need for further treatment by persuasive evidence in light of the court's independent examination from Dr. Bieri".¹

ISSUES

Claimant, appearing Pro Se, requests that the Board reverse the preliminary hearing Order of the ALJ, which denied claimant's requests for additional authorized medical treatment. Claimant contends that the need for medical treatment for her shoulders and neck stem from injuries suffered while she was employed by respondent.

Respondent argues that the Board does not have jurisdiction to review the ALJ's preliminary hearing Order which simply denied medical treatment, based upon the court ordered Independent Medical Examination of Dr. Bieri.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be dismissed for lack of jurisdiction as to

¹ ALJ Order (May 30, 2012).

the issues dealing with claimant's ongoing request for medical treatment to her upper extremities, including the shoulders, but affirmed with regard to the request for medical treatment for claimant's neck.

An Application For Hearing, was filed in Docket No. 1,051,048, by claimant's former attorney Joni Franklin, wherein claimant alleged that she sustained injury to her upper extremities, including her hands, elbows, shoulders and her neck with an injury date of November 1, 2009, and every working day thereafter. Claimant received treatment for her upper extremities with Dr. Salone and Dr. Do, but received no treatment for the shoulders or the neck. The treatment included surgery for carpal tunnel syndrome on claimant's left wrist and surgery on claimant's left elbow under the care of Dr. Do. Claimant returned to work for respondent and later developed new symptoms, again with pain in her upper extremities, in November 2009. Claimant was referred to Dr. Salone, the company physician, and was diagnosed with accumulative trauma disorder in both upper extremities. Dr. Salone recommended claimant undergo therapy and prescribed medication.

Claimant's condition did not improve and she was returned to Dr. Do, who diagnosed recurrent carpal tunnel syndrome, tenosynovitis, and epicondylitis on the left side. Claimant underwent repeat surgery for the entrapment neuropathy at the left wrist and a release of the epicondylitis at the left elbow. Claimant underwent rehabilitation and was released without restrictions on March 1, 2011, by Dr. Do.

Claimant was referred to Dr. Pedro Murati for an evaluation on May 2, 2011. However, the medical report of Dr. Murati was not placed into the record at the preliminary hearing. Instead, it was attached claimant's Brief to the Board filed by the pro se claimant on June 7, 2012. The ALJ's May 30, 2012 Order makes no mention of Dr. Murati's report, although the existence of the report was discussed at the May 29, 2012 preliminary hearing.

The ALJ had earlier ordered an IME with Dr. Bieri, which occurred on November 14, 2011. Dr. Bieri had determined claimant was at maximum medical improvement, and provided ratings for claimant's wrist and elbow on the left side. The report also discusses the cumulative trauma disorder diagnosis of Dr. Salone, but finds no permanent disability for same. Dr. Bieri also discussed the complaints of pain into claimant's neck. However Dr. Bieri opined that both claimant's history and documentation fail to support an injury to claimant's cervical spine region.

Claimant filed a new claim, which was assigned Docket No. 1,060,057, in which she is representing herself, and which involves the same issues and same injury claims as in Docket No. 1,051,048, but with an accident date of November 9, 2009, only. Claimant's attorney Joni J. Franklin, was granted an Order For Withdrawal on February 9, 2012 in Docket No. 1,051,048. Claimant testified that she has attempted to obtain new counsel, but has been unsuccessful.

On February 29, 2012, claimant sought treatment on her own with her family physician, Dr. Hai K. Troung, who would not treat her symptoms, but ran tests to determine what was wrong with the claimant. The medical reports of Dr. Troung were attached to the preliminary hearing transcript and marked as Claimant's Exhibit 1. The examination by Dr. Troung occurred on February 29, 2012, and listed head and neck pain and the word "altercation". A non-contrast CT scan of the head and neck indicated only mild degenerative changes of the cervical spine. Claimant also had large anterior osteophytes at C5-6.

Claimant testified, at the preliminary hearing, that she had been involved in an altercation at the office of the Clerk of the United States District Court for the District of Kansas when she attempted to file certain papers with the Bankruptcy Court. Claimant testified at the preliminary hearing, that along with her workers compensation claims she also had a possible EEOC claim against respondent, as the result of her termination on October 13, 2011. The exact nature of the papers claimant attempted to file with the bankruptcy clerk were never identified in this record. At some point, while trying to file these unidentified papers, claimant became upset with the clerks in the bankruptcy office and became verbally abusive. The United States Marshall's office was called and claimant then had a physical altercation with two Deputy United States Marshals. This altercation, resulted in the filing of a Criminal Complaint against claimant on February 28, 2012. Claimant testified that during the altercation and subsequent arrest, her neck and shoulders were injured. As noted above, claimant was examined by Dr. Troung on February 29, 2012.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments

thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,² the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

The relief requested by claimant at the preliminary hearing consisted of medical treatment for her shoulders and neck. Whether an injured worker should receive additional authorized medical treatment is not one of the issues denoted as jurisdictional under K.S.A. 44-534a. The Board has ruled in the past and continues to hold that issues regarding medical treatment, including change of physician requests, are not jurisdictional in nature and are accordingly not subject to Board review of a preliminary hearing Order.³

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁴ Respondent has not denied shoulder involvement in this matter. Here, one of the questions on appeal deals with claimant's need for medical treatment to the shoulders. That is not an issue over which the Board takes jurisdiction on an appeal from a preliminary hearing order. Accordingly, claimant's application for Board review of the May 30, 2012 Order as it relates to claimant's request for medical treatment for her shoulders is dismissed.

Respondent denied any neck injury occurred as the result of claimant's employment injuries. Therefore, with respect to claimant's request for treatment of the neck, the issue is whether claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. The only medical information in this file involves the IME report of Dr. Bieri, who opines that the history and documentation of claimant's neck complaints fails to support a specific work injury. The medical reports from Dr. Troung indicate injuries to claimant's neck and shoulders were from an "altercation" which claimant acknowledged occurred at the bankruptcy court while claimant was attempting to file unidentified papers. This record does not support a finding that claimant suffered an injury to her cervical spine as the result of any injury or accident which arose out of and in the course of her employment with respondent. The denial of benefits on this issue is affirmed.

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

³ See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSION

(1) This Board Member affirms the ALJ's denial of claimant's request for additional medical treatment to her neck as she has failed to prove a work related connection to her cervical complaints.

(2) Claimant's application for Board review of her request for medical treatment to her upper extremities, including her shoulders, is dismissed for lack of jurisdiction.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated May 30, 2012, is dismissed for lack of jurisdiction as to the denial of medical treatment for claimant's upper extremities, including her shoulders and is affirmed with regard to the denial of medical treatment for claimant's neck.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Kim Dale, Pro Se Claimant
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Thomas Klein, Administrative Law Judge

⁵ K.S.A. 44-534a.